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No. 90-1187

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIE HUNTER, JR.,
Appellant,

v.

FOX MCKEITHEN, Secretary of State of Louisiana, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, apply to elections for state court judgeships that are created and added to pre-existing judicial election districts?

2. If Section 5 does apply, what relief should be ordered by this Court in light of the district court's refusal to enjoin elections held pursuant to voting changes to which the United States Attorney General has objected under Section 5?

PARTIES

The appellant here and plaintiff in the court below is Willie Hunter, Jr. The appellees here and defendants in the court below are Fox McKeithen, Secretary of State of Louisiana; Jerry M. Fowler, Commissioner of Elections of Louisiana; The State of Louisiana; Fay Perry, Registrar of Voters of Ouachita Parish, Louisiana; The City of Monroe, Louisiana; and the following persons who were candidates in 1990 for judgeships on the City Court of Monroe, Louisiana: E. Roland Charles; Diehlman C. Bernhardt; George S. Carso; Bennie Mac Farrar; Larry Jefferson; Catherine L. Stagg; and John Larry Lolley.

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Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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JURISDICTIONAL STATEMENT

The appellant, a black citizen and registered voter of Monroe, Louisiana, appeals from the January 15, 1991 judgment of the three-judge court of United States District Court for the Western District of Louisiana. In that judgment, the district court dismissed the appellant's challenge under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to at-large elections for Monroe City Court judgeships that are the subject of an objection by the United States Attorney General under Section 5. The district court held Section 5 to be inapplicable.

OPINIONS BELOW

The judgment, opinion, and orders of the district court are unreported and are set out in the appendix as follows: The January 15, 1991 judgment (J.S. App. 12a); the order granting summary judgment, filed January 2,

1991 (J.S. App. 6a); the November 7, 1990 opinion explaining the district court's reasoning (J.S. App. 1a); the November 2, 1990 order of the district court denying injunctive relief (J.S. App. 8a); and the interim order of the district court, filed October 4, 1990 (J.S. App. 10a).

JURISDICTION

The judgment of the district court is dated January 15, 1991. The appellant filed a notice of appeal from that judgment on January 18, 1991. (J.S. App. 20a). The appellant also filed a notice of appeal on November 13, 1990 (J.S. App. 22a) from the three-judge district court's November 2, 1990 order denying injunctive relief. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is reproduced in the appendix. (J.S. App. 24a).

STATEMENT OF THE CASE

Prior to the effective date of Section 5 of the Voting Rights Act, the City Court of Monroe, Louisiana had only one judge. Act 393 of the 1977 session of the Louisiana legislature created a second judgeship, and provided that both judges would be elected at-large from designated divisions (the equivalent of numbered posts). The original judgeship was denominated Division A and the second judgeship Division B, and both were required to be elected pursuant to Louisiana's majority vote reqirement. Without seeking Section 5 preclearance of Act 393, the State implemented the Act and elected a judge for Division B beginning in 1978. It was January 18, 1989, nearly twelve years after passage of Act 393, before the State sought clearance from the United States Attorney General. The State's submission to the Attor-

ney General was incomplete, however, leading the Attorney General to request more information, and the submission did not become finalized until August 24, 1990. (J.S. App. 14a).

Meanwhile, the Louisiana legislature passed Act 8 of the 1990 session, which added a third judge to the Monroe City Court to be elected at-large from the new Division C. The submission of that legislation to the United States Attorney General for preclearance also was completed on August 24, 1990. (J.S. App. 14a).

On October 23, 1990, the Attorney General objected under Section 5 to Act 393 of 1977 and Act 8 of 1990, finding that the State had failed to prove the absence of discriminatory purpose and effect in creating the second and third judgeships to be elected at-large from designated divisions with a majority vote requirement. (The Attorney General's letter is reproduced in the appendix, J.S. App. 14a).

This case was filed in the United States District Court for the Western District of Louisiana seeking enforcement of Section 5 against the unprecleared judgeships, which were scheduled for election in the fall of 1990. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1343(3) and (4) and 42 U.S.C. §§ 1973c and 1983. The incumbent judge in Division B was unopposed, but candidates were competing in the October 6 primary and the November 6 runoff for the newly created Division C. The plaintiff sought injunctive relief, and in an October 4 order, the district court permitted the election for Division C to go forward, but prohibited the certification of the winner. (J.S. App. 10a). However, in a subsequent November 2 order, the district court permitted certification of the unopposed candidate in Division B and certification of the winner of the impending November 6 runoff in Division C. (J.S. App. 8a).

The November 2 order was issued on a Friday before the Tuesday election, and on the following Monday, No-

vember 5, the plaintiff filed a motion for reconsideration informing the district court of this Court's November 2 injunction against elections for unprecleared judgeships in *Clark v. Roemer*, 59 U.S.L.W. 3360-3361, No. A-827 (Nov. 2, 1990, as modified Nov. 5, 1990). However, the district court took no action until November 7, the day after the election, when it issued an opinion explaining for the first time the reasoning behind its denial of relief. (J.S. App. 1a).

The district court said the denial was mandated by the recent decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), in which the en banc Fifth Circuit Court of Appeals held that the results test of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, does not encompass challenges to at-large elections for state court judges. According to the district court, *LULAC*'s holding that Section 2 is inapplicable also means that Section 5 is inapplicable where new elected judgeships are created in pre-existing election districts. (J.S. App. 3a-4a). Nowhere in the district court's opinion was there any mention of this Court's recent summary affirmance of a decision holding that Section 5 requires preclearance of judgeships added to pre-existing election districts, *Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 112 L.Ed.2d 243 (1990), even though the district court here was informed of this Court's affirmance in that case shortly after the affirmance was issued on October 15, 1990. The district court did acknowledge this Court's earlier summary affirmance of another three-judge court holding that Section 5 requires preclearance of new judgeships, *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986), and also mentioned this Court's recent injunction against elections for unprecleared judgeships in *Clark*. The district court nevertheless said it was not bound by those decisions.

> This Court recognizes that this decision [denying the injunction] may be in conflict with the opinion

> in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986).
>
> This Court also recognizes that there is a possible conflict between this decision and the Supreme Court's November 2nd ruling in *Clark v. Roemer*, —— U.S. —— (1990). However, since the *Clark* ruling is ambiguous, and the *LULAC* ruling is clear, this court declines to speculate on the possible meaning of *Clark*. Until the Supreme Court or Congress gives the lower courts clearer guidance, this court feels bound by the one clear decision from a controlling authority upon which it can rely.

(J.S. App. 4a).

Following the district court's November 7 decision, the plaintiff filed in this Court a post-election application for stay or injunction pending appeal in order to prevent the winning candidates from taking office in the unprecleared judgeships. This Court denied the application by a 7-2 vote on November 26, 1990. *Hunter v. McKeithen*, 59 U.S.L.W. 3391, No. A-363 (Nov. 26, 1990).

In light of its holding that Section 5 is inapplicable, the district court entered an order, filed January 2, 1991, granting summary judgment against the plaintiff on the Section 5 claim regarding the unprecleared judgeships. (J.S. App. 6a). A final judgment was filed January 15, 1991 (*id.*, 12a) and the plaintiff has taken this appeal.[1]

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[1] The district court did rule for the plaintiff with respect to the unprecleared addition of the areas known as Wards 1, 2, and 4 to the Monroe City Court electorate. (J.S. App. 6a-7a). The Attorney General objected to those additions in the October 23, 1990 Section 5 objection letter (*id.* 15a-16a, 18a), and the district court held that such changes require preclearance. (*Id.* 4a, 6a-7a). No votes from those wards were counted in the 1990 city court elections, and the ruling with respect to those wards is not the subject of this appeal.

THE QUESTIONS ARE SUBSTANTIAL

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT HOLDING THAT SECTION 5 IS APPLICABLE.

In *Brooks* and in *Haith v. Martin*, this Court summarily affirmed lower court holdings that Section 5 applies to the creation of new judgeships in pre-existing election districts. In *Clark v. Roemer*, this Court enjoined elections for state court judgeships that had been the subject of the Attorney General's objection under Section 5.[2] The district court's holding in the present case squarely conflicts with those decisions. This Court has said the following with respect to summary affirmances: "[T]he lower courts are bound by summary decisions of this Court 'until such time as the Court informs [them] that [they] are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), *quoting*, *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973). The district court here acted as if it were not bound by this Court's summary affirmances in *Brooks* and *Haith v. Martin*, and this Court's decision in *Clark*.

While the district court said its holding was mandated by the Fifth Circuit's Section 2 decision in *LULAC*, the district court also recognized the conflict between its holding and this Court's Section 5 decisions in *Haith v. Martin* and *Clark*. (J.S. App. 4a). To the extent a conflict exists between *LULAC* and this Court's decisions in *Haith*, *Brooks*, and *Clark*, the district court was required to follow the decisions of this Court and not the

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[2] A jurisdictional statement appealing the three-judge district court decision in *Clark* has been filed in this Court, No. 90-952, and this Court noted probable jurisdiction on January 18, 1991. In addition, petitions for certiorari addressing the applicability of Section 2 of the Voting Rights Act to judicial elections have been filed in *Clark*, No. 90-898; *Chisom v. Roemer*, No. 90-757; *United States v. Roemer*, No. 1032; *Houston Lawyers' Association v. Mattox*, No. 90-813; and *LULAC v. Mattox*, No. 90-974, and this Court granted the petitions in the latter four cases on January 18, 1991.

Fifth Circuit. Because the district court failed to follow the rulings of this Court, the decision below must be reversed.

II. THE LANGUAGE OF THE VOTING RIGHTS ACT DEMONSTRATES THAT SECTION 5 APPLIES TO ALL ELECTIONS FOR STATE COURT JUDGES IN COVERED JURISDICTIONS.

Section 5 is a statute with a broad sweep, and its language does not make any exception that excludes judicial elections from its coverage. By its own terms, Section 5 encompasses "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure . . . ." (Emphasis added). In addition, Section 14(c)(1) of the Voting Rights Act defines the meaning of "voting" as used in Section 5 and the rest of the Act in the following manner: "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in *any primary, special, or general election*, including, but not limited to . . . having [a] ballot counted properly . . . with respect to candidates for *public or party office* . . . ." 42 U.S.C. § 1973*l*(c)(1) (emphasis added). This obviously includes elections for judges. The district court's decision does not comport with the very language of the Act, and accordingly should be reversed.

III. THIS COURT SHOULD SET ASIDE THE ELECTIONS THAT THE DISTRICT COURT PERMITTED TO OCCUR PURSUANT TO UNCLEARED CHANGES, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF ANY FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's erroneous holding regarding the applicability of Section 5, it permitted the elections to occur and the winners to take office in Divisions B and C even though the Attorney General objected under Section 5 to the method of electing those two judge-

ships. In order to provide effective relief, this Court should now order that the results of the 1990 election process be set aside for the two judgeships.

In *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985), this Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. . . . If appellees fail to seek this approval, *or if approval is not forthcoming*, the results of the March, 1983 election *should be set aside.*

470 U.S. at 182-183 (emphasis added). In the present case, the State has submitted the changes to the Attorney General for approval, and the Attorney General has objected. Thus, the Attorney General's approval is not forthcoming and under *Hampton County*, the elections should be set aside.

In addition to ordering the elections set aside, this Court should remand the case to the district court, which can determine what further remedial measures are necessary in light of the rights of black voters under Section 5 and the interests of the State in the smooth functioning of its justice system. For example, the district court can consider in the first instance whether it is possible to hold new elections for the uncleared seats under an interim court-ordered plan that cures the Section 5 deficiencies and permits the judgeships to remain functional. *See Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982). In the meantime, of course, the State of Louisiana remains free to pass and preclear legislation that would cause these Monroe City Court judgeships to be elected in a manner that satisfies the Voting Rights Act.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

JUDGE WIENER
JUDGE STAGG
JUDGE WALTER

WILLIE HUNTER, JR.

versus

CITY OF MONROE, *et al.*

OPINION OF THE COURT

[Filed Nov. 7, 1990]

Background

Plaintiff brought this action for declaratory and injunctive relief under the 14th and 15th amendments of the United States Constitution and under 42 U.S.C. 1973c, commonly known as Section 5 of the Voting Rights Act. Plaintiff alleged that the addition of two seats to the city court bench (divisions "B" and "C"), and the change allowing residents of Ward 4 to vote in City Court elections are in violation of Section 5 of the Voting Rights Act because, although submissions were made to the Justice Department, no decision on pre-

clearance had been made. All parties stipulate that Louisiana and its political subdivisions are subject to all applicable provisions of the Voting Rights Act.

On September 13, 1990, this three-judge court was constituted by order of Thomas Gibbs Gee, Acting Chief Judge of the United States Court of Appeals for the Fifth Circuit. On September 28, 1990, The Fifth Circuit handed down its opinion in the case of *League of United Latin American Citizens Council No. 4434, et al v. Clements, et al*, Docket No. 90-8014 (September 28, 1990), (hereafter, *LULAC*).

Following the rationale of *LULAC*, this court enjoined the counting of Ward 4 votes, but did not enjoin the elections. The October 6th election was held as scheduled.

On October 23, 1990, the Voting Rights Section of the Justice Department objected to all of the changes which are at issue in this lawsuit. This court then amended its order to permanently enjoin the use of votes cast by residents of Ward 4, and to allow the state to certify winners in the City Court elections without the use of the Ward 4 votes. However, still in reliance on *LULAC*, this court refused to enjoin the implementation of the additional judicial seats and allowed the run-off election to proceed.

LAW

The *LULAC* decision expressly overruled the Fifth Circuit's previous decision in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), which held that Section 2 of the Voting Rights Act, as amended in 1982, applied to judicial elections. The Fifth Circuit held that judges are not "representatives" of those who elect them, but are servants whose purpose is to interpret the law; therefore, the "results" test in Section 2 does not apply. The court based its decision primarily on its interpretation of the 1982 amendment to Section 2, holding that the

"results" test embodied in the amendment "extends the Congressional, non-Constitutional. . . claims no further than the legislative and executive branches, leaving the underlying Constitutional "intent" test in place as to all three." *LULAC*, slip opinion p.3. In other words, the "results" test of Section 2 as amended does not apply to election practices or procedures affecting solely judicial elections.

The majority opinion from the Fifth Circuit did not expressly address the issue of the applicability of Section 5 to judicial elections.[1] However, this Court holds that, under the reasoning in *LULAC*, Section 5 cannot apply to the creation of additional seats in a pre-existing area as was done in the case now before it. Section 5 of the Voting Rights Act works "in tandem" with Section 2. Section 2 defines what constitutes a violation of the Voting Rights Act in the area of election practices and procedures. Section 5 requires pre-clearance of any changes in such practices and procedures. To hold that Section 5 applies in circumstances where Section 2 could not is to provide a remedy without a wrong. Section 5 preclearance is required to *prevent* violations as delineated in Section 2. There is no way that the addition of more judges, to be elected by the same voters who elect the present judges, and whose jurisdiction will be exactly the same as that of the existing judges, can violate Section 2; therefore, there is simply no reason for preclearance.

Even though the Justice Department denied clearance to the proposed change in the number of judges to be elected to the City Court bench, the denial can have no effect for without even the possibility of a violation, the court has no grounds to enjoin the election implementing

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[1] Although the Court did note, almost *en passant*, at p.20 of the slip opinion, the *Haith* decision, cited *infra*.

the new practice or procedure or otherwise fashion a remedy.

This court recognizes that this decision may be in conflict with the opinion in *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd. mem.*, 477 U.S. 901 (1986).

This court also recognizes that there is a possible conflict between this decision and the Supreme Court's November 2nd ruling in *Clark v. Roemer*, —— U.S. —— (1990). However, since the *Clark* ruling is ambiguous, and the *LULAC* ruling is clear, this court declines to speculate on the possible meaning of *Clark*. Until the Supreme Court or Congress gives the lower courts clearer guidance, this court feels bound by the one clear decision from a controlling authority upon which it can rely. No purpose is served by submission of the question of creation of districts "B" and "C" for pre-clearance since, if denied—by action or inaction—injunction would be prohibited under the clear terms of *LULAC*. The court would be protecting a remedy that is without an injury.

As to the addition of Ward 4 voters to "A." "B." and "C." the possibility of an intentional dilution of minority voting strength does arise. Since an intentional dilution would come under the Constitutional "intent" test still present in the Voting Rights Act and still applicable to judicial elections, pre-clearance or a declaratory judgment from a three-judge Court from the D.C. Circuit will be necessary before such a change can be given effect. Since the Justice Department has objected to the changes, the votes of the Ward 4 voters can not be given effect without a change in the Justice Department's ruling or a declaratory judgment. Therefore, the preliminary injunction of the original order was made permanent by the order filed November 2, 1990.

All pending motions in this case are remanded to a single judge a three-judge court being unnecessary for a

hearing on them. THUS DONE AND SIGNED this 7th day of November, 1990.

/s/ Jacques L. Wiener
JACQUES L. WIENER
United States Circuit Judge

/s/ Tom Stagg
TOM STAGG
Chief United States District Judge

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

WILLIE HUNTER, JR.,

Plaintiff,

versus

CITY OF MONROE, *et al.*,

Defendants.

THREE-JUDGE COURT

JACQUES L. WIENER, JR.—United States Circuit Judge

TOM STAGG—Chief, United States District Judge

DONALD E. WALTER—United States District Judge

ORDER GRANTING SUMMARY JUDGMENT

[Filed Jan. 2, 1991]

In light of this Court's opinion of November 7, 1990, and because there is no genuine issue as to any material fact, summary judgment is hereby issued under Rule 56, F.R.Civ.P., as follows:

1. With respect to the addition of Ward 4 to the electorate of the Monroe City Court, summary judgment is entered for the plaintiff. That addition has not been precleared and has been the subject of an objection by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Accordingly, the Court declares that any implementation of that addition in the absence of preclearance violates Section 5. The defendants are permanently enjoined from implementing the addition unless and until preclearance is obtained.

2. With respect to the proposed addition of Wards 1 and 2 to the electorate of the Monroe City Court, summary judgment is entered for the plaintiff. Those proposed additions have not been precleared and have been the subject of an objection by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Accordingly, the Court declares that any implementation of those additions in the absence of preclearance violates Section 5.

3. With respect to Divisions B and C of the Monroe City Court, judgment is entered for the defendants for the reasons stated in the Court's November 7, 1990 opinion.

The plaintiff's request for attorney's fees has been referred to the Monroe Division judge for decision.

A judgment will be issued pursuant to Rule 58, F.R. Civ.P.

IT IS SO ORDERED. THUS DONE AND SIGNED this 31st day of December, 1990.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
United States Circuit Judge

/s/ Tom Stagg
TOM STAGG
Chief United States District Judge

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

JUDGE WIENER
JUDGE STAGG
JUDGE WALTER

WILLIE HUNTER, JR.

versus

CITY OF MONROE, *et al.*

ORDER

[Filed Nov. 2, 1990]

Pending before this court is plaintiff's motion for reconsideration, certification, and comprehensive relief. For reasons to be stated in an opinion to follow, plaintiff's motion is GRANTED in part and DENIED in part.

Plaintiff's request for reconsideration of this court's denial of the previously requested injunction as to Division "C" is DENIED.

Plaintiff's request for a permanent injunction excluding Ward 4 residents from voting in Monroe City Court elections is GRANTED. In addition, the State defendants are hereby permitted to certify the winners of the Divisions "A," "B," and "C" races without counting the votes cast by residents of Ward 4.

Plaintiff's request that this court hold that Division "B" is required to be precleared or approved is DENIED.

Plaintiff's request for a permanent injunction excluding voters from Wards 1 and 2 from voting for Monroe City Court judges is DENIED because the issue of Wards 1 and 2 is not ripe for injunctive relief.

IT IS SO ORDERED. THUS DONE AND SIGNED this 2nd day of November, 1990.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
United States Circuit Judge

/s/ Tom Stagg
TOM STAGG
Chief United States District Judge

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

JUDGE WIENER
JUDGE STAGG
JUDGE WALTER

WILLIE HUNTER, JR.

versus

CITY OF MONROE, *et al.*

ORDER

[Filed Oct. 4, 1990]

Pending before this court is plaintiff's motion for a preliminary injunction. Plaintiff's motion is granted in part and denied in part. The opinion of this Court is to follow.

The State of Louisiana, acting through the Secretary of State, the Commissioner of Elections, the Ouachita Parish Clerk of Court, the Ouachita Parish Registrar of Voters, the City of Monroe, and all persons acting in active concert with the named government defendants are hereby enjoined from utilizing votes cast in Ward 4, Precinct 1, or in any other precinct where Ward 4 voters are customarily allowed to vote, and from certifying a winner in the Monroe City Court Division "A" or "C" judges' races until such time as pre-clearance is obtained or further order of the Court.

The request for injunction of the election in the Division "C" is Denied.

The motion to dismiss filed by the City of Monroe and plaintiff's request for attorney's fees are referred to the Monroe Division judge for decision. IT IS SO ORDERED.

THUS DONE AND SIGNED this 3rd day of October, 1990.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
United States Circuit Judge

/s/ Tom Stagg
TOM STAGG
Chief United States District Judge

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

THREE-JUDGE COURT

JACQUES L. WIENER, JR.—United States Circuit Judge

TOM STAGG—Chief, United States District Judge

DONALD E. WALTER—United States District Judge

WILLIE HUNTER, JR.,
Plaintiff,

v.

CITY OF MONROE, *et al.*,
Defendants.

[Filed Jan. 15, 1991]

JUDGMENT

This action came on for hearing before this Court, and a decision having been rendered on motion for summary judgment,

IT IS ORDERED AND ADJUDGED that

1. With respect to the addition of Ward 4 to the electorate of Monroe City Court, summary judgment is entered for the plaintiff. That addition has not been precleared and has been the subject of an objection by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Accord-

ingly, the Court declares that any implementation of that addition in the absence of preclearance violates Section 5. The defendants are permanently enjoined from implementing the addition unless and until preclearance is obtained.

2. With respect to the proposed addition of Wards 1 and 2 to the electorate of the Monroe City Court, summary judgment is entered for the plaintiff. Those proposed additions have not been precleared and have been the subject of an objection by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Accordingly, the Court declares that any implementation of those additions in the absence of preclearance violates Section 5.

3. With respect to Division B and C of the Monroe City Court, summary judgment is entered for the defendants denying plaintiff's claim that preclearance was required for Divisions "B" and "C".

4. This is a final judgment approved by and entered on behalf of the Court. The plaintiff's request for attorney's fees has been referred to the Monroe Division judge for decision.

Monroe, Louisiana, this 15 day of January, 1991.

/s/ Donald E. Walter
DONALD E. WALTER
District Judge
For the Three-Judge Court

[SEAL]

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Office of the Assistant Attorney General
Washington, D.C. 20530

October 23, 1990

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Charles L. Hamaker, Esq.
City Attorney
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Monroe, Louisiana 71210-0123

Dear Ms. Rougeou and Mr. Hamaker:

This refers to Act No. 393, H.B. No. 945 (1977), which provides for an second judgeship and the adoption of numbered positions (Divisions A and B); Act No. 8, S.B. No. 345 (1990), insofar as it provides for a third judgeship, elected from a numbered position (Division C), the provision that a judge may not practice law, and the implementation schedule; Act No. 728, H.B. No. 2047 (1990), which also provides for a third judgeship and, in addition, provides for a change in method of election from at large to two single-member districts and one at large, a districting plan, the implementation schedule, and the provision that a judge may not practice law; and three annexations for the Monroe City Court in Ouachita Parish, Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the information to complete your submission on August 24, 1990.

We have considered carefully the information you have provided, as well as comments and information from

other interested parties. At the outset, we note that as of November 1, 1964, the Section 5 coverage date, the Monroe City Court electorate included the residents of Wards 3 and 10 in Ouachita Parish, and the City Court had one elected judge. According to the 1980 Census, this electorate was 48.4 percent black in population. All changes adopted since November 1, 1964, are now before the Attorney General for preclearance. In sum, it is proposed that the Court have three judges elected at large with numbered positions, and under the state's open primary system, they also are to be elected by majority vote. The geographic jurisdiction of the Court is to be expanded by adding Wards 1, 2, and 4, which would reduce the black population percentage, from 48.4 percent to 39.2 percent, using 1980 Census data. Act No. 728 (1990) also provides for a change to a system of two districts and one at-large position; however, this proposed method of election will become effective only "[i]f the federal courts finally determine that the present method of electing Louisiana trial judges violates Section 2 of the Voting Rights Act of 1965 and requires the subdistricting of such courts as a remedy."

With regard to the annexations, we begin with the proposition that where a jurisdiction seeks to expand its electorate in a manner that significantly reduces black voting strength, Section 5 preclearance may not be granted unless the jurisdiction has obviated the retrogressive effect by adopting an election system "which would afford [black voters] representation reasonably equivalent to their political strength in the enlarged community." *City of Richmond* v. *United States*, 422 U.S. 358, 370 (1975). Our review indicates that the at-large election system for the City Court does not provide black voters with an equal opportunity to participate effectively in the political process and to elect candidates of their choice to the City Court. In particular, City Court elections appear to be characterized by a pattern of racially polar-

ized voting, and there would seem to be a variety of readily discernible alternative election schemes (including, but not limited to, a fairly drawn plan of single-member districts) which would afford black voters a more realistic opportunity to participate in City Court elections and to elect candidates of their choice to these offices.

In that regard, we note that while Ward 4 had been eligible to be added to the City Court jurisdiction since at least 1970, there appears to have been little or no interest in implementing this change until immediately prior to the 1984 City Court primary election, which we understand was marked by the presence of the first black candidate for the City Court. We further understand that prior to that election there was an effort to add Wards 1 and 2 as well.

The two additional City Court judgeships, then, were established in the context of an election system that does not give black voters an equal opportunity to participate in the political process and to elect candidates of their choice to the City Court. Furthermore, the adoption and use of designated positions and a majority vote requirement enhances the discriminatory nature of the election system utilized for filling positions on the City Court and their use, in the context of the racial bloc voting which seems to exist, in our view results in a clear violation of Section 2 of the Voting Rights Act. In addition, with respect to the third judgeship, it appears that it was established as an at-large position over the protest of black leaders and with the knowledge that the district court in *Clark* v. *Edwards*, 724 F. Supp. 294 (M.D. La. 1988), already had found (relying in part on the presence of racially polarized voting in the 1984 City Court contest) that voting is racially polarized in both the district court judicial district and the court of appeals district in which the Monroe City Court is located.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor

a discriminatory effect. See *Georgia* v. *United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, our guidelines provide that a submitted change may not be precleared if its implementation would lead to a clear violation of Section 2 of the Act. See 28 C.F.R. 51.55. Because we cannot conclude, as we must under the Voting Rights Act, that your burden has been sustained in this instance, and because our view is that use of the at-large election system with designated posts and majority vote results in a clear violation of Section 2, I must, on behalf of the Attorney General, interpose an objection to the changes occasioned by Act No. 393, Act No. 8 and Act No. 728 relative to the third judgeship position, and the three annexations to the Monroe City Court system.

In reaching this decision, we are not unmindful of the recent decision of the Fifth Circuit Court of Appeals in *League of United Latin American Citizens* v. *Clements*, No. 90-8014 (Sept. 28, 1990) (*"LULAC"*) (*en banc*) which held that the Section 2 results standard is not applicable to judicial elections. The *LULAC* court, however, expressly recognized that "Section 5 of the Act applies to state judicial elections" (Slip op. at 20) and until this matter is clarified further by the courts we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.

With respect to the election method change and districting plan contained in Act No. 728 (1990), it appears that these changes are not capable of implementation at the present time. Also the implementation schedules provided in Act Nos. 8 and 728 (1990) are moot in the current circumstances. Accordingly, no determination is necessary or appropriate with respect to these changes. 28 C.F.R. 51.35.

Lastly, the Attorney General does not interpose any objection to the change in qualifications for serving as a

City Court judge. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. 28 C.F.R. 51.41.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes to which we have objected do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the two additional judgeships, the adoption of designated positions, and the three annexations to the court system continue to be legally unenforceable.

Because this matter is pending before the court in *Hunter* v. *City of Monroe*, C.A. No. 90-2031 (W.D. La.), we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

cc: Honorable Jacques L. Wiener, Jr.
United States Circuit Judge

Honorable Tom Stagg
Chief United States District Judge

Honorable Donald E. Walter
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

THREE-JUDGE COURT

JACQUES L. WIENER, JR.—United States Circuit Judge
TOM STAGG—Chief, United States District Judge
DONALD E. WALTER—United States District Judge

WILLIE HUNTER, JR.,
Plaintiff,

v.

CITY OF MONROE, ROBERT E. POWELL, MAYOR; FAY PERRY, OUACHITA PARISH REGISTRAR OF VOTERS; WILLIAM "FOX" MCKEITHEN, SECRETARY OF STATE; JERRY M. FOWLER, COMMISSIONER OF ELECTIONS; E. ROLAND CHARLES, DIEHLMANN C. BERNHARDT, GEORGE S. CARSO, BENNIE MAC FARRAR, LARRY JEFFERSON, CATHERINE L. STAGG, JUDGE JOHN LARRY LOLLEY, AND STATE OF LOUISIANA,
Defendants.

NOTICE OF APPEAL

The Plaintiff, Willie Hunter, Jr., files this notice of appeal to the United States Supreme Court from the Judgment of the three-judge district court dated and

filed January 15, 1991. Said Judgment having been entered after entry of the Order Granting Summary Judgment dated December 31, 1991, based upon the record and the opinion of the court filed November 7, 1990.

This appeal is filed pursuant to 42 U.S.C. Section 1973c and 28 U.S.C. Section 1253.

Respectfully Submitted,

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[Certificate omitted in printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

THREE-JUDGE COURT

JACQUES L. WIENER, JR.—United States Circuit Judge

TOM STAGG—Chief, United States District Judge

DONALD E. WALTER—United States District Judge

WILLIE HUNTER, JR.,

Plaintiff

versus

CITY OF MONROE, ROBERT E. POWELL, MAYOR; FAY PERRY, OUACHITA PARISH REGISTRAR OF VOTERS; WILLIAM "FOX" MCKEITHEN, SECRETARY OF STATE; JERRY M. FOWLER, COMMISSIONER OF ELECTIONS; E. ROLAND CHARLES, DIEHLMANN C. BERNHARDT, GEORGE S. CARSO, BENNIE MAC FARRAR, LARRY JEFFERSON, CATHERINE L. STAGG, JUDGE JOHN LARRY LOLLEY, AND STATE OF LOUISIANA,

Defendants

NOTICE OF APPEAL

[Filed Nov. 13, 1990]

The Plaintiff, Willie Hunter, Jr., files this notice of appeal to the United States Supreme Court from the decisions of the three-judge district court date November 2, 1990 and November 7, 1990, as well as the decision of October 4, 1990, which was the subject of a motion for reconsideration decided as part of the November 2, 1990

decision. This appeal is filed pursuant to 42 U.S.C. Section 1973c and 28 U.S.C. Section 1253.

Respectfully Submitted,

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STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1979b(a) of this title based upon determinations made under the second sentence of section 1979b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment

no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following recept of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

No. 90-1187

FILED
FEB 25 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

WILLIE HUNTER, JR.

Appellant,

versus

FOX McKEITHEN, SECRETARY OF STATE OF LOUISIANA; JERRY M. FOWLER, COMMISSIONER OF ELECTIONS OF LOUISIANA; THE STATE OF LOUISIANA; FAY PERRY, REGISTRAR OF VOTERS OF OUACHITA PARISH LOUISIANA; THE CITY OF MONROE, LOUISIANA; E. ROLAND CHARLES; DIEHLMANN C. BERNHARDT; GEORGE S. CARSO; BENNIE MAC FARRAR; LARRY JEFFERSON; CATHERINE L. STAGG AND JOHN LARRY LOLLEY

Appellees.

Appeal From The United States District Court For The Western District Of Louisiana

MOTION TO DISMISS OR AFFIRM

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February 25th, 1991

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MOTION TO DISMISS OR AFFIRM

This is a direct appeal[1] from an Order granting Summary Judgment, as rendered on the 31st day of December, 1990;[2] a Judgment as signed and filed on the 15th day of January, 1991;[3] and an Opinion as rendered and entered on the 7th day of November, 1990,[4] by a district court of three judges specifically constituted pursuant to 28 U.S.C. § 2284.

Appellees, pursuant to Rule 18¶.6. of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein or, in the alternative, to affirm the final judgment and decree of the three-judge court on the ground that it is manifest that the questions on which this case depends are so unsubstantial as not to need any further argument.

---

[1] Two Notices of Appeal were filed. *See* Appendix to Jurisdictional Statement [hereinafter "App."] 20a-21a [First Notice] and App. 10a-11a [Second Notice]. The contents of this paragraph are derived from the second such notice. The appellate relief as sought in the first notice was, in part [non-certification of Division "A" Judgeship] asked by Hunter to be removed, in part [non-certification of Division "C" judgeship] removed by the three-judge court by subsequent decrees and the remaining parts [injunction concerning Ward 4 votes and the denial of the injunction against the election for the Division "C" judgeship] were reiterated in subsequent decrees and were covered, in pertinent part, by the Second Notice.

[2] *See* App. 6a-7a.

[3] *See* App. 12a-13a.

[4] *See* App. 1a through 5a.

STATEMENT OF THE CASE

This Appeal involves questions arising under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

Appellant, Willie Hunter, Jr. [hereinafter "Hunter"] brought this lawsuit on September 4, 1990 in the United States District Court for the Western District of Louisiana. Hunter's complaint asserted that two Acts of the Legislature of Louisiana, pertaining to the creation of two judgeships for the City Court of Monroe, Louisiana, had not been precleared by the Justice Department pursuant to Section 5 of the Voting Rights Act.

The Louisiana Legislative Acts as drawn in question were Acts 1977, No. 393, which provided for a judgeship for Division "B" of the City Court of Monroe and Acts 1990, No. 8, which provided for a judgeship for Division "C" of the City Court of Monroe.[5]

---

[5] The City Court of Monroe was created by Acts 1898, No. 138. A single judge was to preside over this court. The court's jurisdiction included Wards 3 and 10. Justice of the Peace Courts and Constables were abolished in these two Wards. Four amendments were made to Acts 1898, No. 138, which are insignificant for these proceedings. These, however, were Acts 1908, No. 255, jurisdiction in Wards 3 and 10; Acts 1924, No. 31, Jurisdiction in Wards 3 and 10; Acts 1938, No. 121, jurisdiction in Wards 3 and 10; Act 1958, No. 338, jurisdiction in Wards 3 and 10. Initially pertinent to these proceedings was an amendment by Acts 1960, No. 32 which extended civil jurisdiction to those Wards in Ouachita Parish which were contiguous to Wards 3 and 10 and in which no Justice of the Peace had been elected or in which the Justice of the Peace was absent or was otherwise unable to serve. Ward 4 is contiguous to Wards 3 and 10 and has not elected a Justice of the Peace for Ward 4 since

(Continued on following page)

By the time Hunter's Complaint was filed on September 4, 1990, Judge John Larry Lolley had been elected on July 27, 1990 to the Division "B" judgeship for the City of Monroe as an unopposed candidate.[6] This was for the commencement of Judge Lolley's third term as he has been the only Division "B" judge since the creation of the position by Acts 1977, No. 393. No injunctive relief was sought as to this Division "B" judgeship. Instead, Hunter

---

(Continued from previous page)

Robert G. Harmon was elected on April 19, 1932. A question initially posed in Hunter's complaint was whether the electorate in Ward 4 could vote for the judges of the City Court of Monroe. The three-judge court ruled, in pertinent part, that:

> As to the addition of Ward 4 votes to "A," "B," and "C," the possibility of an intentional dilution of minority voting strength does arise. Since an intentional dilution would come under the Constitutional "intent" test still present in the Voting Rights Act and still applicable to judicial elections, preclearance or a declaratory judgment from a three-judge court from the D.C. Circuit will be necessary before such a change can be given effect. Since the Justice Department has objected to the changes, the votes of the Ward 4 voters can not be given effect without a change in the Justice Department's ruling or a declaratory judgment. Therefore, the preliminary injunction of the original order was made permanent by the order filed November 2, 1990.

Unpublished Opinion, *Hunter v. City of Monroe, et al.*, Docket No. 90-2031 (W.D. La. 1990) three-judge court, Pages 4-5.

No appeal as to this part of the three-judge court's ruling has been taken by any of the parties below.

[6] *See.* La. R.S. 18:511B which provides for the automatic election of a candidate if the qualifying period closes without opposition.

sought a declaratory judgment to determine whether Judge Lolley might properly continue to be elected as the Division "B" Judge if his seat was not precleared.[7] Since there were four viable candidates for the judgeship position for Division "C", injunctive relief was sought as to Division "C."[8]

Although only a month was to elapse between the filing of the Complaint and the scheduled primary election on October 6, 1990, issue was joined, all discovery was completed, and 36 document entries were logged prior to the issuance of the three-judge court's first definitive order on the 3rd day of October, 1990 denying the request for injunction of the judicial election for Division "C." By this order Louisiana, acting through its officials therein named, was enjoined from tabulating the votes cast in Ward 4, Precinct 1, and from certifying a winner in Monroe City Court, Division "A" or "C" pending preclearance or further order of the Court.[9] The election of a judge for Division "A" and for Division "C" occurred as scheduled on October 6th, 1990. Hunter filed a Motion for Reconsideration, Certification and Comprehensive Relief, requesting: the certification of the Divisions "A" judge as having been duly elected, but to exclude Ward 4 votes and requiring the preclearance of the Division "B" judgeship; that the incumbent Division "B" judge not be certified as elected but that, as an incumbent judge, he be allowed to sit pending preclearance; and to enjoin the tabulation of votes from Wards 1 and 2, along with Ward 4.

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[7] *See* Complaint, paragraph 5.

[8] *See* Complaint, prayer, paragraph d.

[9] *See* App. 10a-11a.

The three-judge court in an order, dated and filed the 2nd day of November, 1990, responding to the Motion, denied the injunction request as to Division "C"; granted a permanent injunction as to the inclusion of Ward 4 votes; and permitted the State defendants to certify the winner of Divisions "A," "B," and "C" races. The order also denied the request that Division "B" be precleared and prohibited the counting of Ward 4 votes, but denied the voting exclusion of Wards 1 and 2 as not being ripe for injunctive relief.[10]

An opinion was issued by the three-judge court on November 7, 1990. In pertinent part, the court held:

> The majority opinion from the Fifth Circuit did not expressly address the issue of the applicability of Section 5 to judicial elections. [Footnote omitted] However, this Court holds that, under the reasoning in *LULAC*, Section 5 cannot apply to the creation of additional seats in a pre-existing area as was done in the case now before it. Section 5 of the Voting Rights Act works "in tandem" with Section 2. Section 2 defines what constitutes a violation of the Voting Rights Act in the area of election practices and procedures. Section 5 requires pre-clearance of any changes in such practices and procedures. To hold that Section 5 applies in circumstances where Section 2 could not, is to provide a remedy without a wrong. Section 5 preclearance is required to *prevent* violations as delineated in Section 2. There is no way that the addition of more judges, to be elected by the same votes who elect the present judges, and whose jurisdiction will be exactly the same as that of the existing judges, can

---

[10] *See* App. 8a-9a.

violate Section 2; therefore, there is simply no reason for preclearance.

Even though the Justice Department denied clearance to the proposed change in the number of judges to be elected to the City court bench, the denial can have no effect for without even the possibility of a violation, the court has no grounds to enjoin the election implementing the new practice or procedure or otherwise fashion a remedy.

This court recognizes that this decision may be in conflict with the opinion in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986).

This court also recognizes that there is a possible conflict between this decision and the Supreme Court's November 2nd ruling in *Clark v. Roemer*, ___ U.S. ___ (1990). However, since the *Clark* ruling is ambiguous, and the *LULAC* ruling is clear, this court declines to speculate on the possible meaning of *Clark*. Until the Supreme Court or Congress gives the lower courts clearer guidance, this court feels bound by the one clear decision from a controlling authority upon which it can rely. No purpose is served by submission of the question of creation of districts "B" and "C" for pre-clearance since, if denied – by action – injunction would be prohibited under the clear terms of *LULAC*. The court would be protecting a remedy that is without an injury.

Unpublished Opinion, *Hunter v. City of Monroe, et al.*, Docket No. 90-2031 (W.D. La. 1990) (three-judge court), pages 3-4.[11]

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[11] *See* App. 1a through 5a for the entire Opinion.

Hunter filed a Notice of Appeal to this Court on November 13, 1990, from the October 4, 1990, November 2, 1990, and the November 7, 1990 decisions of the three-judge court.[12]

On November 14, 1990 Hunter filed an Application for Stay and Injunction Pending Appeal of the Decision of the Three-Judge Court of the United States District Court for the Western District of Louisiana. The Application was directed to Circuit Justice Scalia. Hunter therein asserted:

> The district court's order of November 2 should be stayed to the extent it permits certification of the winning candidates in Divisions B and C. This Court should enjoin the Secretary of State from certifying the winners or, if they already have been certified by that time, should require the Secretary of State to withdraw the certification. The Court should further enjoin the winning candidates from taking office.

Application, page 7.[13]

Following the filing of a memorandum for the United States as *amicus curiae*, a response by the respondents, a reply memorandum of the applicant and a letter by the respondents, this Court, on November 26, 1990 issued the following order:

> The application for stay and injunction of the judgment of the United States District Court for the Western District of Louisiana pending

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[12] *See* App. 22a-23a.

[13] *Hunter v. Fox McKeithen, et al.*, A-363, October Term, 1990.

> appeal presented to Justice Scalia and by him referred to the Court is denied. Justice Marshall and Justice Stevens would grant the application.[14]

On the 31st day of December, 1990, the three-judge court issued an order, permanently enjoining the implementation of Wards 1, 2 and 4 as to the electorate of the Monroe City Court pending preclearance; and the court entered judgment for the defendants as to Divisions "B" and "C" of the Monroe City Court, for the Reasons stated in its November 7, 1990 Opinion.[15] Accordingly, judgment was entered on the 15th day of January, 1991.[16]

A Notice of Appeal to this Court was then filed from

> [T]he Judgment of the three-judge district court dated and filed January 15, 1991. Said Judgment having been entered after entry of the Order Granting Summary Judgment dated December 31, 1991[sic], based upon the record and the opinion of the court filed November 7, 1990.[17]

ARGUMENT

I. THE THREE-JUDGE COURT CORRECTLY RULED THAT THE ADDITION OF TWO MONROE CITY JUDGESHIPS DID NOT REQUIRE § 5 PRE-CLEARANCE.

The analysis by the three-judge court in its opinion as rendered on November 7, 1990,[18] logically follows both the *en banc* opinion of the United States Court of Appeals

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[14] *Hunter v. McKeithen*, U.S.L.W. 3391 (U.S. Nov. 26, 1990) (Order) (A-363).

[15] *See* App. 1a-5a.

[16] *See* App. 20a-21a.

[17] *See* App. 6a-7a.

[18] *See* App. 1a through 5a.

for the Fifth Circuit in its decision in *League of United Latin American Citizens Council No. 4434 v. Clements* ("*LULAC*"), 914 F.2d 620 (5th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3500 (U.S. January 18, 1991) (No. 90-974), and the guidelines as adopted by the United States Justice Department in its Procedures for the Administration of Section 5, 28 C.F.R. §§ 51.51 through 51.63. In *LULAC*, a majority of the Fifth Circuit held:

> In 1982, when Congress determined to expand Section 2 of the Act to incorporate a results test for vote dilution, it stopped short of imposing such a test for judicial offices on the States by limiting it to their election of "representatives."

914 F.2d at 631. After this decision was rendered by the Fifth Circuit on September 28, 1990, the Justice Department wrote its objection letter of October 23, 1990, in the instant case, stating:

> [O]ur guidelines provide that a submitted change may not be precleared if its implementation would lead to a clear violation of Section 2 of the Act. *See* 28 C.F.R. 51.55. Because we cannot conclude, as we must under the Voting Rights Act, that your burden has been sustained in this instance, and because our view is that use of the at-large election system with designated posts and majority vote results in a clear violation of Section 2, I must, on behalf of the Attorney General, interpose an objection to the changes occasioned by Act No. 393, Act No. 8 and Act No. 728 relative to the third judgeship position, and the three annexations to the Monroe City court system.[19]

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[19] This letter is reproduced at App. 14a through 19a.

A reading of 28 C.F.R. § 51.55 clearly reflects reference to "a clear violation of *amended* Section 2." (emphasis supplied) It is this amended Section 2 that the *LULAC en banc* Court found to be inapplicable to state judicial election processes. In establishing its guidelines, the Justice Department in 28 C.F.R. § 51.56 acknowledges its obligation to be guided by decisions such as *LULAC*:

> § 51.56 Guidance from the courts.
>
> In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts.

The Justice Department's decision is in violation of this regulation.[20] Further, the Justice Department's position is

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[20] The Justice Department's failure to follow its own regulation requirement that it take guidance from relevant decisions of the Federal courts was forcefully illustrated in the decision by a three-judge court sitting in Texas, *Mexican American Bar Association of Texas v. The State of Texas* and *United States of American v. State of Texas, et al.*, Numbers 90-CA-171 and A-90-CA-1018 (Consolidated) (W.D. Tex. 1990) (three-judge court), WL 252313. The court's majority opinion admonished the Justice Department with the following:

> We close by expressing our concern at the actions taken, and the position expressed, by the Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in *LULAC*, that court, sitting en banc, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. By a margin of 7-6, the court declared that the election of judges, in general, is not within the ambit of section 2.

(Continued on following page)

internally inconsistent with its avowed purposes in making § 5 determinations:

(Continued from previous page)

Despite this plain ruling, the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election sytem[sic] with numbered posts and majority vote results in a clear violation of Section 2. . . . " During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the *LULAC* decision, even as to electoral changes in the three states encompassing the Fifth Circuit.

This position reflects a disturbing disregard for the rule of law. The Attorney General is not merely preserving, as an advocate, an issue for possible latter resolution by the Supreme Court. Instead, he has taken official action, by interposing an administrative objection, that is based solely upon a ground definitively rejected as the law in the Fifth Circuit. The DOJ participated actively in the *LULAC* litigation and now, having lost, seeks to assert its view by ignoring the law of the circuit.

The aim of the United States here is salutary – to effect the laudable goals of the Act by opposing changes that, in the view of the Attorney General, have the purpose or effect of diminishing the role of minorities in the electoral process. However, as the instant action is brought under the Act, both this court and the Attorney General are limited to the role assigned by Congress in passing the Act.

The circuit court by which this district court is bound (absent Supreme Court directive) has declared that section 2 does not apply to the election of judges. The United States, as a litigant in this

(Continued on following page)

§ 51.51 Purpose of this subpart.

The purpose of this subpart is to inform submitting authorities and other interested parties of the factors that the Attorney General considers relevant and of the standards by which the Attorney General will be guided in making substantive determinations under section 5 and defending section 5 declaratory judgment actions.

28 C.F.R. § 51.51.

(Continued from previous page)

court, is bound by that determination. Likewise, it may not wield its administrative sword in this circuit in contravention of the interpretation of the Act enunciated by the Fifth Circuit (again, absent any intervening declarations by the Supreme Court).

The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

Opinion of the three-judge court (December 26, 1990), *Mexican American Bar Association of Texas v. The State of Texas* and *United States of America v. State of Texas, et al.*, Numbers 90-CA-171 and A-90-CA-1018 (Consolidated) (W.D. Tex. 1990) pages 13-15, WL 252313.

The act at issue here reads in pertinent part:

§ 1952. Courts created by special legislative act

The following city courts, heretofore created and established by special legislative act, are hereby recognized and continued in existence and, except as otherwise provided in this Section, their territorial jurisdiction shall extend through the city and ward or wards wherein the city in which they are domiciled is located, as extended from time to time:

* * *

(15) The City Court of Monroe, domiciled in the city of Monroe, parish of Ouachita, having three city judges and a city marshal. The court shall be divided into three divisions, which shall be designated as divisions "A," "B," and "C." In civil matters, the territorial jurisdiction of the court shall extend also to those wards in Ouachita parish which are contiguous to Wards 3 and 10 and in which no justice of the peace has been elected and qualified or in which the duly elected and qualified justice of the peace is absent from the ward or is otherwise unable to serve.

Acts 1990, No. 8. This same act created two additional judgeships in Orleans Parish:

§ 1136. Civil District Court for the parish of Orleans; judges

D. Divisions M and N of the Civil District court for the parish of Orleans are hereby created for the purpose of nomination and election of the judges elected to fill the two additional judgeships created by this Section. Judges elected to these divisions shall be elected by the qualified voters of Orleans Parish and shall have jurisdiction throughout the parish.

Acts 1990, No. 8.

The Attorney General by letter of September 17, 1990,[21] interposed no objection to the creation of two additional judgeships for Orleans Parish, yet the manner of their election is precisely the same as that of the Monroe city judgeships at issue here and complained of by the Attorney General, namely, "the at-large election system with designated posts and majority vote." It is incredible (and insupportable) that in one instance the Louisiana election system results in a "clear violation of Section 2" yet in another instance precisely the same system does not result in a "clear violation of Section 2."

The Justice Department, while acknowledging that its objection "is not to the number of judges *per se*"[22] and that the Justice Department does not question the State of Louisiana's "need for or purpose in creating judgeship positions,"[23] insists that Louisiana should change its

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[21] The preclearance letter by the United States Department of Justice, Civil Rights Division, is reproduced in the Appendix to this Motion, pages App. 17 through App. 19. On the same day, September 17, 1990 the Attorney General wrote another letter objecting to the remainder of the created judgeships under Acts 1990, No. 8 as well as judgeships created by other acts. One of these acts was Acts 1974, No. 515 which provided for an additional judgeship, Division B, Sixth Judicial District. An election was nevertheless held for that judgeship position on October 6, 1990. The Justice Department was so happy with the outcome of that election, that the Justice Department, shortly thereafter, without a request therefor, precleared Acts 1974, No. 515. *See* Appendix to this Motion, pages App. 20-21.

[22] *See* letter of October 9, 1990 as reproduced in the Appendix to this Motion, pages App. 1 through App. 3, at page App. 2.

[23] *See* letter of September 17, 1990, as reproduced in the Appendix to this Motion, pages App. 4 through App. 16, at page App. 12.

entire judicial electoral selection process[24] by adopting a limited voting or cumulative voting scheme.[25] Limited voting, as the name implies, restricts the votes that may be cast for elective positions to a number less than the aggregate number of the total election positions for which votes are cast. For example, if there were eight judgeships for which elections were being held, the votes to be cast might be four. By cumulative voting, as the name implies, a voter may cast multiple votes for one or more of the judgeship candidates. Once again, if there were eight judgeships for which elections were being held, all eight votes could be cast for one judicial candidate. In addition to violating the Voting Rights Act, 42 U.S.C. § 1973n, such systems could not be used in the many districts where there is but one judgeship position available. Again, on a district specific basis where some acts creating judgeship positions have been precleared while other acts creating judgeship positions have not, one would have a smorgasbord of an election system with varying scenarios, the impracticability of which is obvious. Although the Justice Department wishes to destroy the majority vote system in

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[24] This approach follows the Justice Department's oft quoted reference to the trial judge's opinion requiring a systemic approach in *Clark v. Edwards*, 725 F.Supp. 285, 303 (M.D. La. 1988). The Justice Department ignores the same trial judge's subsequent holding in *Clark v. Roemer*, ___ F.Supp. ___ (M.D. La. 1990) that such a systemic approach is not lawful but rather a district specific remedy is required under the Voting Rights Act as interpreted by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

[25] *See* letter of September 17, 1990, as reproduced in the Appendix to this Motion, pages App. 4 through App. 16, at page App. 11.

Louisiana and replace the majority vote system with either limited voting or cumulative voting, the Justice Department apparently is not yet ready for this court to decide whether a majority vote system, *per se*, violates Section 2 of the Voting Rights Act. Just this month [February 4th, 1991] in the brief of the United States as *amicus curiae* as filed in *Whitfield v. Democratic Party of Arkansas*, 686 F.Supp. 1365 (E.D. Ark. 1988), *aff'd by an equally divided court*, 902 F.2d 15 (8th Cir. 1990) (*en banc*), *cert. denied, sub nom., Whitfield v. Clinton*, 59 U.S.L.W. ___ (U.S. February 25, 1991) (No. 90-383), the Solicitor General, on behalf of the United States, cautioned this Court not to involve itself in majority vote requirement cases pending "further study" in the lower courts "before it is addressed by the court." In its *amicus* brief the United States asserted:

> DISCUSSION
>
> The questions whether Section 2 challenges to majority vote requirements can be maintained, and how they should be assessed, are important to the enforcement of the Voting Rights Act by the United States. There are majority vote or substantial plurality requirements for state offices in eleven States [footnote omitted] and for offices in numerous localities. The United States is currently challenging certain applications of the majority vote requirement under Section 2 of the Voting Rights Act, and regularly evaluates the effect of such requirements in reviewing changes submitted for preclearance under Section 5, 42 U.S.C. 1973c.
>
> These questions, however, have received limited consideration by the lower courts, and,

as yet, have not generated substantial disagreement among the circuits. fn

> fn. Only the Second Circuit has ruled on whether the operation of a party primary runoff requirement for single member offices violates the Voting Rights Act. In *Butts v. City of New York*, 779 F.2d 141 (1985), the Second Circuit considered a challenge to a New York statute requiring a run-off election in the party primary for city-wide office if no party candidate received more than 40% of the vote. In deciding that there was no Voting Rights violation, a divided panel of that court ruled that a majority vote requirement in a primary for candidates for single-member offices was not "the kind of electoral arrangement[ ] that can violate the Act." 779 F.2d at 148. The majority distinguished the case of "elections for multi-member bodies" by explaining that (*ibid.*)
>
> > [t]here can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

In addition, the inability of the en banc court of appeals to issue an opinion in this case counsels against review by this Court. While we think the district court erred in its standing analysis, and while we do not share that court's expressed reservations about the applicability of Section 2 to the majority vote requirement at issue here, the district court, in the final analysis, did

> address petitioners' Section 2 claim on the merits under the totality of the circumstances test. That is the correct legal test; the question whether the district court property applied that test to the facts before it – a matter as to which we have significant doubts – does not warrant further review in this Court.
>
> We anticipate that the question of the validity under Section 2 of particular majority vote requirements will arise in future cases. Given the present lack of a circuit conflict, the fact that most circuits have not addressed the issue at all, and the fact that the only precedential opinion in this case is that of the district court – which applied the correct test – we believe that the issue will benefit from "further study" in the lower courts "before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.). Accordingly, the petition should be denied.

Whitfield v. Democratic Party of Arkansas, 686 F.Supp. 1365 (E.D. Ark. 1988), *aff'd by an equally divided court*, 902 F.2d 15 (8th Cir. 1990) (*en banc*), *cert. denied, sub nom., Whitfield v. Clinton*, 59 U.S.L.W. ___ (U.S. February 25, 1991) (No. 90-383), *Amicus* Brief of United States, pages 8-10.

Although not addressed by the three-judge court, both of the judgeships involved in this proceeding are single judgeships. Such single judgeships are single offices, and the Voting Rights Act has been held not to apply to single office holders. *See Butts v. City of New York*, 779 F.2d 141 (2nd Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986); *League of Latin American Citizens Counsel #4434 v. William P. Clements, et al.*, 914 F.2d 620, 546 (5th Cir. 1990) (*en banc*) (Higginbotham, Jr., concurring).

Additionally, it is to be noted that Louisiana's Election Code, La. R.S. 18:1, *et seq*, was adopted by the Louisiana Legislature as Acts 1976, No. 697. La. R.S. 18:511, 512 provides for a majority vote requirement. This Act was precleared by the Department of Justice in October of 1976.

II. EVEN IF SECTION 5 OF THE VOTING RIGHTS ACT IS APPLICABLE IN THIS CASE, RELIEF SHOULD BE PROSPECTIVE AND THE RECENTLY ELECTED JUDGES SHOULD BE ALLOWED TO REMAIN IN OFFICE.

This Court has in the past refused to set aside elections held under statutes that had not been precleared, holding that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." *Perkins v. Matthews*, 400 U.S. 379, 396-97, 91 S.Ct. 431, 27 L.Ed.2d 476, 489-90 (1971); *accord, Berry v. Doles*, 438 U.S 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978); *Allen v. Board of Elections*, 393 U.S. 544, 571-72, 89 S.Ct. 817, 22 L.Ed.2d 1, 20-21 (1969).

In *Berry v. Doles*, 438 U.S. 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978), an action was filed in a three-judge court shortly before a primary election to enforce the requirements of § 5 and to prevent the pending election. The requests for declaratory and injunctive relief were not acted upon until after the scheduled primary election and the subsequent run-off election. The three-judge court afforded prospective relief only by enjoining further enforcement of the statute but did not set aside the

results of the elections. On appeal, this Court refused to void the elections, holding:

> We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for simultaneous election of all members of the Board at the 1978 general election.

438 U.S. at 192-93, 98 S.Ct. 2692, 57 L.Ed.2d at 696.

In this case, as in *Berry*, the action was filed shortly before the primary election. This action was not filed until after qualifying for the posts had ended. On October 4, 1990, two days before the October 6 primary election, the three-judge court granted an injunction in part, preventing use of votes in Ward 4 and preventing certification of a winner in two of the three pending elections until preclearance was obtained or until further order of the court. The request to enjoin the election in the other division was denied.

Hunter did not choose to appeal the partial denial of an injunction to this Court. Instead, two weeks after the October 6 election, Hunter filed a Motion for Reconsideration, Certification, and Comprehensive Relief. On November 2, 1990, the three-judge court granted a permanent injunction excluding Ward 4 residents from voting in Monroe City Court elections. The three-judge court allowed certification of the winners in the three City

Court races without counting votes cast by Ward 4 residents. A request by Hunter to modify the order was denied after the run-off election.

Thus, here, as in *Berry*, no action was filed until after qualification for the primary election had ended. Although the three-judge court refused to enjoin the primary elections, Hunter did not file an appeal to this Court. Only after the primary election had been held and the votes tabulated, after the ensuing run-off campaigns had been run, and after the run-off election had been held and the votes tabulated, did Hunter seek relief in this Court. On November 26, 1990, this Court issued the following Order:

> The application for stay and injunction of the judgment of the United States District Court for the Western District of Louisiana pending appeal presented to Justice Scalia and by him referred to the Court is denied. Justice Marshall and Justice Stevens would grant the application.

Hunter v. McKeithen, 59 U.S.L.W. 3391 (U.S. Nov. 26, 1990) (Order) (A-363).

Given the foregoing circumstances, if this Court should hold that § 5 does apply, the election should not be voided, but instead the three-judge court should be instructed to set a period within which preclearance must be sought; otherwise the election results could be set aside. *See also NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182-83, 105 S.Ct. 1128, 84 L.Ed.2d 124, 137 (1985); *Georgia v. United States*, 411 U.S. 526, 541, 93 S.Ct. 1702, 36 L.Ed.2d 472, 485 (1973); *United States v. County Commission, Hale County, Alabama*, 425 F.Supp. 433 (S.D. Ala. 1976).

CONCLUSION

In this case, Hunter has complained of the passage of two Acts of the Louisiana Legislature which have not been precleared by the U.S. Justice Department, Civil Rights Division. One of these Acts 1977, No. 393 provides for a judgeship for Division "B" of the City Court of Monroe. There has been a judge serving in this judgeship position for two six-year terms and commencing this year for a third term of six years. The other judgeship as provided by Acts 1990, No. 8 pertains to Division "C" of the City Court of Monroe. These judgeships were created to satisfy an expanding caseload in the City Court of Monroe. As previously shown on page 14 *supra*, the Justice Department does not object to the number of judges *per se* and the Justice Department does not question the State of Louisiana's need for or purpose in creating additional judgeships. Rather the Justice Department wants to substitute a system of limited voting or cumulative voting for Louisiana's existing majority vote system. The Justice Department has, however, counseled against this Court's present consideration of this majority vote requirement because of its limited consideration to date by the courts below. The Justice Department believes that this issue will benefit from further study in the lower courts before it is addressed by this Court. *See* pages 16-18 *supra*.

Appellees, therefore, urge this Court to dismiss this appeal or, in the alternative, to affirm the decision of the three-judge court below.

All of the above and foregoing is thus respectfully submitted.

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APPENDIX

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[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the
Assistant Attorney General *Washington, D.C. 20530*

OCT 9 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider the September 23, 1988, objection under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your request on August 10, 1990.

Under the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, an objection shall be withdrawn "if the Attorney General is satisfied that the change does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group." 28 C.F.R. § 51.48(b). In its request for reconsideration the State of Louisiana has offered no new information or arguments to show that the electoral method by which its additional judges will be elected is not racially discriminatory. Rather, it appears that the State seeks a clarification of the reach of the Attorney General's objection.

In that regard, we iterate here what we sought to make clear in our September 23, 1988, objection letter, that our concerns under Section 5 went to the proposed method of electing judges and not to the number of judges *per se*. As we have suggested previously on a number of occasions, adoption by the State of a racially fair election scheme would provide an appropriate basis for withdrawing the objection. Until such time as the objection is withdrawn, however, the State may not lawfully implement any part of the process for electing those judicial positions which are the subject of outstanding Section 5 objections. See *NAACP v. Hampton County Election Commission*, 460 U.S. 166 (1985).

Under these circumstances, then, we see no basis for altering our earlier conclusions in this matter. Accordingly, on behalf of the Attorney General, I must decline to withdraw the September 23, 1988, objection.

Of course, in making this determination, we are cognizant of the recent decision of the Fifth Circuit Court of Appeals in *LULAC v. Mattox*, No. 90-8014 (5th Cir. September 28, 1990) (*en banc*) and we are studying the court's decision in that case to determine how, if at all, it may impact upon our enforcement responsibilities under the Voting Rights Act. However, we feel a responsibility to point out that we do not presently see that decision as immediately affecting the previously interposed objections to judicial elections in Louisiana.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

ATTACHMENT A

Judicial District Court Districts	Voting Changes
1st	Act 117 (1973), which creates an additional judgeship and a special election therefor
4th	Act 480 (1970), which creates an additional judgeship position
9th	Act 19 (1974), which creates an additional judgeship and a special election therefor
14th	Act 40 (1967), which creates an additional judgeship and a special election therefor
	Act 332 (1975), which creates an additional judgeship and a special election therefor
	Act 322 (1980), which creates an additional judgeship
15th	Act 360 (1970), which creates an additional judgeship and a special election therefor
	Act 43 (1976), which creates an additional judgeship
	Act 322 (1980), which creates an additional judgeship
18th	Act 86 (1968), which creates an additional judgeship and a special election therefor

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the
Assistant Attorney General *Washington, D.C. 20530*

SEP 17 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
State of Louisiana
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your requests on June 19 and 26 and August 10, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to the voting changes identified in Attachment B for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We received your submission of Act 8 (1990) on June 19, 1990; supplemental information concerning those changes was received June 26 and July 12 and 17, 1990. We received the information to complete your submission of the remaining changes identified in Attachment B on July 17, 1990.

At the outset we begin with a recitation of some of the events which have preceded our review of all the voting changes which are before us today because those events play an important part in our consideration of these matters. You may recall that in 1987, we sent the State a number of letters requesting information concerning numerous voting changes within judicial election circuits and districts in Louisiana, including a request that the State respond to allegations that the method of electing trial and appellate court judges discriminated against minority voters. The State, however, failed to respond to our requests.

Meanwhile, in 1988, the court in *Clark v. Edwards* – a suit brought in 1986 by private plaintiffs challenging the method of electing judges in Louisiana – found that the method of electing trial and appellate court judges produced a "systemic" violation of Section 2 of the Voting Rights Act. By the time of the court's 1988 decision, the State still had not supplied us with the additional information we needed to analyze the voting changes in judicial circuits and districts then pending before us. Consequently, we used the record and findings from the *Clark* lawsuit to analyze the voting changes that were then pending before us for Section 5 review. On September 23, 1988, an objection was interposed under Section 5 of the Voting Rights Act.

In 1989, the State again submitted voting changes to us for Section 5 review and, there again, sought Section 5 preclearance of voting changes in judicial circuits and districts that had been found by the court in *Clark* to be racially discriminatory or had otherwise been the subject of the Section 5 objection interposed in 1988. Thus, on

May 12, 1989, a Section 5 objection was interposed to the implementation of those changes.

Later that year, in the summer of 1989, the State adopted a new election scheme, intended to remedy both the Section 2 violations found by the *Clark* court and the Section 5 objections interposed by the Attorney General in 1988 and 1989. However, because the proposed system created new senior judgeship positions in an apparent effort to accommodate and protect incumbent judges who might otherwise lose their seats if a racially fair election scheme were put in place, it required the approval of the voters in a state-wide referendum. As you know, that proposed scheme was disapproved by the voters in a November 1989 referendum.

Remedial proceedings in the *Clark* lawsuit were held earlier this year and those proceedings culminated in additional findings from the court. *Clark v. Roemer*, No. 86-435 (M.D. La., Orders of June 12 and July 6, 1990). On the basis of those findings alone, the State now seeks reconsideration of the previously interposed objections, as well as Section 5 preclearance of other voting changes which were either never before the court in the *Clark* litigation or were otherwise not before that court in the same circumstances as they are before us under Section 5. These include the 10th, 24th, 26th and 40th Judicial Districts, and the 2nd and 3rd Circuit Courts of Appeal. With regard to these judgeship positions and the proposed method of election therefor, we find the *Clark* decision to be inapposite because it pertains to factual circumstances in a judicial district different from the judicial district now before us for Section 5 review.

In that regard, we note that the differing factual circumstances are not insignificant. For example, one aspect of the *Clark* litigation involved a challenge to the method of electing judges in the 26th District. Because the State had not obtained Section 5 preclearance of the creation of a fifth judgeship in that District, the court in *Clark* examined the evidence in the context of four existing judgeships. Because the State has submitted to us a proposal to add a fifth judgeship to the 26th District, however, we are reviewing the method of electing judges in that district as it would exist if *five* judges were being elected. This distinction is critical because the *Clark* court found that a sample single-member district drawn in that District by private plaintiffs did not satisfy the requirement under *Thornburg v. Gingles*, 478 U.S. 30 (1986), that the minority group be shown to be sufficiently large and geographically compact to constitute a majority in a single-member district. As a result, though the at-large multimember structure in the 26th District now has been found by the court in *Clark* not to violate Section 2 because of that finding, the court properly made no determination with regard to the method of election if five judges were to be elected from that district.

Another example of how the facts and circumstances before us differ from those which were before the court in *Clark* is in the 2nd Circuit Court of Appeal. In the 2nd Circuit, the claims before the *Clark* court involved a challenge to a mixed election system for seven judges, in which one judge was elected at large circuitwide and six judges were elected from three double-member districts. We, however, are reviewing the creation of additional judgeship positions for the 2nd Circuit in the context of

proposed changes to the electoral structure: first, to an interim scheme of one circuitwide position, one double-member district and two triple-member districts; and, second, to an election scheme that subsequently will be comprised of three triple-member districts with at-large elections by designated posts, staggered terms, and majority vote. Similarly, as to the 3rd Circuit, the *Clark* Litigation involved a challenge to a scheme of three at-large circuitwide positions and three double-member districts, while we have been asked to assess the creation of additional judgeship positions in the context of an electoral structure that provides for three at-large circuitwide positions and three triple-member districts.

The fact, then, that the *Clark* court has vacated some of its findings as to a violation under Section 2 does not in and of itself afford a basis for withdrawing the objection under Section 5 to the voting changes involved. Indeed, during our reconsideration of the objected-to voting changes and our review of the additional voting changes that you have submitted, you have provided us with additional information concerning the voting changes and judicial districts at issue by incorporating information contained in certain Section 5 submissions that you made in 1989 and in response to our requests during the current review period. Much of the information does not appear to have been before the court in the *Clark* case. For example, in analyzing voting patterns to determine whether black voters are politically cohesive and whether whites vote sufficiently as a bloc usually to defeat the choice of black voters, the court in several instances did not have the benefit of any data concerning

parishwide election contests or data by parish for contests involving a number of parishes. We have analyzed such data, and our analysis indicates a significant degree of racially polarized voting in the districts at issue. Also, we have been able to analyze information that was not before the court concerning the racial identity of federally-registered voters, as well as demographic and voting information concerning modifications to alternative election schemes that demonstrate the geographical concentration of black persons in certain judicial districts.

Nor can we overlook the fact that in the face of findings of a systemic Section 2 violation by the *Clark* court in 1988, and notwithstanding the interposition of far-reaching Section 5 objections in 1988 and 1989, the State has failed to adopt a racially fair election system for its trial and appellate court judges even though the *Clark* court has given the State ample opportunity to do so. While, as noted above, the State did propose a new election scheme in 1989, it did so in a way which was intended also to protect incumbent judges. It is also particularly telling that there is nothing in Louisiana law we are aware of which would prevent the State from simply adopting a racially fair election scheme without incorporating referendum requiring provisions such as that connected with the earlier proposal aimed at current officeholders. Thus, the State's failure and refusal to adopt any remedial measures without also seeking to protect incumbents, the vast majority of whom are white, would appear to be elevating the State's concern for protecting white incumbents over the vindication of minority voting rights.

It is also significant that in several judicial districts, the State has available to it any number of alternative election schemes in which black voters clearly would have the opportunity to elect candidates of their choice. Yet, the State has not adopted any of these alternatives. For example, with regard to the proposed redistricting of the 10th District, we note that the State proposes to carve out one parish in order to create a new single-member judicial district, the 39th District, which has a 36.4 percent black population. The State thus chose to divide the 10th District in a manner that created one majority-white, single-member district, even though a single-member judicial district could be created which would have a substantial black-majority population. While we are cognizant that the proposed boundary lines apparently are based on parishes as the basic building blocks, these lines are not jurisdictional in nature but serve merely to outline the boundaries of the districts for election purposes. Accordingly, strict adherence to this criterion results in the dilution of a cohesive black population within the proposed new districts. Moreover, the State has deviated from this criterion in devising the districts of the 5th Circuit Court of Appeal which, inexplicably, the state has chosen not to do with regard to the proposed 10th and 39th Districts.

Similarly, with regard to the 2nd Circuit Court of Appeal, which has a 34.2 percent black population, there are alternatives for electing the proposed nine judges in which black voters would have a realistic opportunity to elect candidates of their choice. Also, with regard to the 3rd Circuit Court of Appeal, which has a 23.7 percent black population, available alternatives for the proposed

twelve judges would afford black voters the opportunity to elect candidates of their choice. As noted in our 1988 objection letter, such remedial alternatives would not necessarily require the State to draw single-member districts in every instance since, in a number of areas, the State could retain the multimember system utilizing limited or cumulative voting and abandoning the use of the racially discriminatory features such as numbered posts and majority vote which enhance dilution in those circuits.

In 1988, the *Clark* court admonished the State to "revise the [judicial election] system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). So too, in 1988, we informed the State that it had a responsibility to consider appropriate remedial adjustments to afford black voters an opportunity to participate on an equal basis with white voters and to elect candidates of their choice. Notwithstanding these suggestions, the State has steadfastly adhered to the racially discriminatory multimember scheme and has resisted efforts in the *Clark* case to create single-member districts. Yet, as noted earlier, single-member districts are not the only available remedy. Indeed, our September 23, 1988 letter expressly observed that other corrective measure [sic] were available to the State, such "as the use of limited or cumulative voting schemes and the elimination of restrictive election features, such as anti-single shot voting devices and the majority vote requirement, that impede minority participation." The State has chosen not to avail itself of such remedial options.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In satisfying its burden, the submitting authority must demonstrate that the choices underlying the proposed change are not tainted, even in part, by an invidious racial purpose; it is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting change. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977); *City of Rome, supra*, at 172; *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982); *aff'd*, 459 U.S. 1166 (1983). While we do not in any way question the State's need for or purpose in creating new judgeship positions, we do find ourselves unable to conclude that the State has carried its burden of showing the absence of the proscribed purpose in its insistence on maintaining and expanding the existing dilutive system for electing candidates to those positions, a system that has been found by the court, or our analysis, to be violative of Section 2 of the Voting Rights Act. See, *e.g.*, 28 C.F.R. 51.55(b). Therefore, on behalf of the Attorney General, I must continue the objection to the implementation of the changes enumerated in Attachment A and object to the changes enumerated in Attachment B.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect or result of denying or abridging the right to vote on account of race or color.

In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objections by the Attorney General is to continue the legal unenforceability of the changes identified in Attachments A and B. See also 28 C.F.R. 51.10.

Because this matter remains pending before the court in *Clark*, we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

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Fred J. Cassibry, Esq.
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ATTACHMENT A

Judicial District Court Districts	Objected-to Voting Changes
6th	Act 515 (1974), which creates an additional judgeship and a special election therefor
10th	Act 635 (1979), which redistricts the boundaries of the district
16th	Act 104 (1968), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division G)
20th	Act 34 (1981), which creates an additional judgeship
21st	Act 9 (1974), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division F)
23rd	Act 464 (1968), which creates an additional judgeship and a special election therefor
24th	Act 78 (1968), which creates an additional judgeship and a special election therefor
	Act 674 (1968), which creates an additional judgeship
	Act 503 (1974), which creates two additional judgeships and the special elections therefor

27th	Act 158 (1971), which creates an additional judgeship and a special election therefor
29th	Act 94 (1970), which creates an additional judgeship
	Act 56 (1984), which recodifies the additional judgeship under Act 94 (1970)

Circuit Courts of Appeal	Objected-to Voting Changes
First Circuit, Districts 2 and 3	Act 114 (1975), which creates an additional judgeship in each district and special election therefor and provides an implementation schedule
Section Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
	Act 801 (1987), which creates an additional circuitwide judgeship and special election therefor
Third Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
Third Circuit, Districts 1, 2, and 3	Act 801 (1987), which creates an additional judgeship in each district and special elections therefor
	Act 200 (1987), which changes the special election dates under act 801 (1987)

ATTACHMENT B

Judicial Districts	Voting Changes
24th	Act 8 (1990), which creates an additional (sixteenth) judgeship
26th	Act 174 (1989), which creates an additional judgeship
40th	Sections 3(A) and 3(B) of Act 611 (1989) and Act 608 (1989), which create an additional judgeship position (Division C)
2nd Circuit, Court of Appeal	Act 8 (1990), which creates a ninth judgeship position to be elected by designated Division C in 2nd Circuit District 3; provides for a change in method of election for 2nd Circuit judges from two elected at-large circuitwide and two elected from each district by designated divisions to three elected from each district by designated divisions, except as specified for the incumbent in the at-large position to be converted to the Division C position of Second Circuit District 2; provides that the judgeship position created by Act 801 (1987) will be elected as the designated Division C position from 2nd Circuit District 1; and provides an implementation schedule therefor

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the
Assistant Attorney General *Washington, D.C. 20530*

SEP 17 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the following voting changes for the State of Louisiana:

> Orleans Parish Criminal District Court: Act 236 (1972), which creates an additional judgeship and a magistrate, and act 143 (1975), which creates five additional judges and decreases terms from twelve years to six years;
>
> Orleans Parish Civil District Court: Act 235 (1970), which creates an additional judgeship position (Division J), and Act 129 (1975), which creates five additional judgeships and decreases terms from twelve years to six years.

We received your requests on June 19 and 26 and August 3, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to Act No. 8, S.B. No. 345 (1990), to the extent that it creates the thirteenth and fourteenth at-large judgeships (Divisions M and N) for the Orleans

Parish Civil District Court; and provides an implementation schedule therefor for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We receive your submission on June 19, 1990; supplemental information was received July 13 and 17, 1990.

At the outset, we note that when the state originally submitted Acts 129 and 143 (1975), the submissions characterized the voting changes as an increase from five to ten judgeship positions for both the civil and criminal district courts in Orleans Parish. Although we asked for clarification of the voting changes effected by these statutes, we have not received your response. Our further analysis, however, indicates the following:

(1) Act 129 recodifies ten judgeship positions, eight of which antedate the state's coverage under Section 5 and one of which received the requisite Section 5 preclearance in 1986. Accordingly, the effect of the September 23, 1988, objection applied only to the tenth judgeship position (Division J) for the Orleans Parish Criminal District Court, a position that was initially created under Act 235 (1970) and recodified by Act 129 (1975).

(2) Act 143 (1975) recodifies ten judgeship positions, seven of which antedate the state's coverage under Section 5. Accordingly, the effect of the September 23, 1988, objection to Act 143 (1975) applied only to three judgeship positions for the Orleans Parish Criminal District Court.

We have carefully reviewed the information you have provided, as well as comments and information from other sources and interested parties. Our analysis indicates that the changes do not have the purpose and will

not have the effect of discriminating on the basis of race or color and that implementation of the changes will not lead to a clear violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Accordingly, the objections interposed September 23, 1988, and May 12, 1989, to the specified changes for the Orleans Parish Civil and Criminal District Courts are hereby withdrawn. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48 and 51.55).

With regard to the changes under act 8 (1990) for the Orleans Parish Civil District Court, the Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. See 28 C.F.R. 51.41.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

SEAL

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Nov. 20, 1990

Dear Ms. Rougeou:

This refers to the September 23, 1988, objection, under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to Act 515 (1974), which creates an additional judgeship (Division B) and provides for a special election therefor in the 6th Judicial District of the State of Louisiana.

As you know, on September 17, 1990, the Attorney General declined to withdraw the objection, based on the information that was then available. Since that time, we have received and carefully reviewed additional factual information relevant to the creation and implementation of the Division B judgeship position. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.46). More specifically, our analysis of the October 6, 1990, election returns has led us to further reconsider our determination with regard to the 6th Judicial District, and, based on that reconsideration we are satisfied that the concerns we previously entertained no longer prevail in that district. Accordingly, the objection interposed September 23, 1988, and continued September 17, 1990, to the specified changes under Act 515 (1974) is hereby withdrawn. See 28 C.F.R. 51.48 and 51.55. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act

expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. 28 C.F.R. 51.41.

Because this matter remains pending before the court in *Clark v. Roemer*, No. 86-435-A (M.D. La.), we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

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No. 90-

IN T

Supreme Court of

OCTOBER T

WILLIE HU

v.

FOX MCKEITHEN, S
of Louisia

On Appeal from the Unite
for the Western Dis

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Appellees.

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OSITION TO
SS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1187

WILLIE HUNTER, JR.,

Appellant,

v.

FOX MCKEITHEN, Secretary of State of Louisiana, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

This brief is filed in order to make the following points in response to the Motion to Dismiss or Affirm.

1. Part I of the Motion to Dismiss or Affirm is entirely a critique of the substance of the Attorney General's objection to the voting changes at issue. The defendants contend that because *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *cert. granted*, Nos. 90-813 and 90-974 (Jan. 18, 1991), held Section 2 inapplicable to the election of judges, the Attorney General acted improperly in partially basing his Section 5 objection upon the Section 2 infirmities growing out of the at-large election of the judgeships involved in this case. (Motion at 8-12). However, the court below has no jurisdiction to review the substance of the Attorney General's objection, and neither does this Court on appeal.

United States v. Board of Supervisors of Warren County, 429 U.S. 642, 645-646 (1977). The only question is whether Section 5 is applicable, and this Court previously has held that it is. *Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 111 S.Ct. 288 (1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). Even if the *LULAC* holding were relevant, it is being reviewed by this Court on writs of certiorari, and it is the plaintiffs' contention here that *LULAC* was decided wrongly.

2. As for the defendants' claim that "[t]he Justice Department . . . insists . . . Louisiana should change its entire judicial electoral selection process by adopting a limited voting or cumulative voting scheme," (Motion at 14-15), that also goes to the merits of the Attorney General's objection. Moreover, it is inaccurate. The Attorney General has objected in this case to only two city court judgeships, not to the entire judicial election system, and his October 23, 1990 objection letter stated that a number of potential remedies are available to the State. (J.S. App. 15a-16a). In no way is the Attorney General insisting that Louisiana adopt limited or cumulative voting to elect its judgeships.

3. The defendants are off-base in their discussion of the Solicitor General's position and this Court's denial of certiorari in the Section 2 majority vote runoff case of *Whitfield v. Clinton*, No. 90-383. (Motion at 17-18, 22). That case has no relevance to the present litigation, which involves the district court's failure to enforce the Attorney General's Section 5 objection to at-large elections for two city court judgeships.

4. The defendants cite *Berry v. Doles*, 438 U.S. 190, 192-193 (1978), for the proposition that the illegal elections in the present case should not be set aside, but should remain in effect while the State seeks Section 5 clearance. (Motion at 19-21). Of course, in *Berry*, no clear-

ance had previously been sought and the defendants there contended that the particular elections at issue had not been held pursuant to the uncleared change. 438 U.S. at 192. Under those circumstances, this Court ordered that the defendants be given thirty days in which to seek clearance. By contrast, in the present case, clearance has been sought from the Attorney General and has been denied. Of more relevance than *Berry* is this Court's statement in the post-*Berry* case of *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985): "[I]f [the Attorney General's] approval is not forthcoming, the results of the . . . election should be set aside." *Id.* at 182-183. In the present case, the Attorney General's approval has been sought and is not forthcoming. The elections should therefore be set aside.

5. In their Motion to Dismiss or Affirm, the defendants here suggest that because this case was filed after the candidate qualification period for the judgeships at issue, the relief given should be the same as that in *Berry* inasmuch as the *Berry* case also was filed after qualification had ended. They also imply that the failure to seek emergency injunctive relief from this Court until after the election occurred, but before the winners took office, somehow precludes the elections being set aside. (Motion at 20-21). In its decisions on the merits of Section 5 cases, this Court never has conditioned the ultimate form of relief upon the timing of the complaint, or upon the timing of any earlier application for emergency relief in this Court. Indeed, in *Hampton County*, in which this Court said elections must be set aside if the Attorney General's approval is not forthcoming, the case was filed only four days before the election at issue. 470 U.S. at 173. No application for an emergency injunction was filed in this Court in *Hampton County*. Thus, nothing in the timing of the present case precludes the operation of *Hampton County*'s rule that the elections must be set aside where the Attorney General withholds Section 5 clearance.

6. The question of the appropriate relief in this type of situation is being briefed on the merits in *Clark v. Roemer*, No. 90-952, in which this Court noted probable jurisdiction on January 18, 1991, and which is scheduled for oral argument on April 22, 1991.

Respectfully submitted,

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